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**ATTORNEYS FOR PLAINTIFFS**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

**CHANEE THURSTON, and TANASHA  
DENMON-CLARK, on behalf of themselves  
and all others similarly situated,**

**Plaintiffs,**

**v.**

**CONOPCO, INC, d/b/a UNILEVER  
(formerly d/b/a GOOD HUMOR-  
BREYERS) d/b/a BREYERS,**

**Defendant.**

Joseph N. Kravec, Jr. (admitted *pro hac vice*)  
**STEMBER FEINSTEIN DOYLE  
& PAYNE, LLC**  
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**CASE NO.: CV 10-04937-PJH**

**CLASS ACTION**

**PLAINTIFFS' ADMINISTRATIVE  
MOTION FOR LEAVE TO FILE SUR-  
REPLY IN FURTHER OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
AND TO STRIKE FOOTNOTE 7 AND  
RELATED ARGUMENT**

**DEMAND FOR JURY TRIAL**

DATE: March 2, 2011  
TIME: 9:00 a.m.  
CTRM: 3, 3rd Floor

## INTRODUCTION

Plaintiffs Chanee Thurston and Tanasha Denmon-Clark, by their undersigned counsel, hereby move for leave to file a Sur-Reply in Further Opposition to Defendant’s Motion to Dismiss (“Sur-Reply”) and to strike footnote 7 and all related argument in Defendant’s Reply in Support of Motion to Dismiss (Doc. 36) (“Reply”).

This Sur-Reply is necessary to address arguments Defendant raised for the first time in its Reply. Good cause for authorizing a sur-reply is generally found where a reply brief raises new arguments for the first time or cites authority which was not originally cited in its initial brief. *Altivion Inv. v. Konica Minolta*, 2008 WL 2020593, \*1 n. 1 (N.D.Cal. 2008). Here, Defendant has revamped its arguments by raising new authorities and making completely new arguments in its Reply.

Specifically, in its Reply, Defendant raises three new arguments, which are the basis for Plaintiffs’ current motion. Defendant raises new “procedural matters,” twists Plaintiffs’ Amended Complaint in novel ways (*e.g.*, now suggesting that Plaintiffs’ alleged legal theory requires class members to know that potassium carbonate is a synthetic while sodium carbonate is a natural ingredient – which is not what the Amended Complaint alleges), and includes an entirely new express preemption argument based upon entirely new statutory authority, *i.e.*, that Plaintiffs’ claims are supposedly preempted by Federal Food Drug and Cosmetic Act (FFDCA) §§ 403(g), 403(i)(2), and 403(k) because of the “natural flavor” regulations. *See* Reply at 2, 3, 9. Defendant previously asserted that preemption was based upon FFDCA §§ 403(q) and 403(r) and did not identify the flavor regulations as a basis for preemption. *See* Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss Amended Complaint (Doc. 23) (“Def. Mem.”) at p. 13.

Plaintiffs therefore respectfully submit that a Sur-Reply will allow Plaintiffs to address these three new arguments in a meaningful way. Plaintiffs’ response to these newly minted arguments entails specific reference and citation of several additional authorities that would make presentation of this response at oral argument difficult and cumbersome without the aide of prior briefing. Plaintiffs’ proposed Sur-Reply, which is only 5 pages in length, is attached.

1 In addition, Plaintiffs move this Court to strike Defendant's footnote 7 in its Reply and the  
 2 related argument at page 9 lines 13-14 and page 10 lines 12-16, which is based on an FDA warning  
 3 letter from 1993 that is not in the public domain, which Defendant has not attached to its Reply, and  
 4 to which Plaintiffs' therefore have had no fair ability to respond. *See Sweet v. Pfizer*, 232 F.R.D.  
 5 360, 364 & n. 6, n. 7 (C.D.Cal.2005) (court may, in its discretion, consider evidence submitted in  
 6 reply brief "to the extent that it replies to arguments raised in the Opposition and does not raise new  
 7 issues or introduce new information).

8 As set forth in the Declaration of Joseph N. Kravec, Jr., filed herewith as Exhibit 2, in  
 9 compliance with Local Civil Rule 7-11, Plaintiffs' have sought a stipulation to file this motion, but  
 10 such request has been denied by refused counsel.

11 WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs leave to file the  
 12 Sur-Reply attached hereto and strike footnote 7 of Defendant's Reply and all argument based  
 13 thereon. A proposed Order of Court is also attached.

14 Dated: February 23, 2011

**BRAUN LAW GROUP, P.C.**

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 16 By: s/Michael D. Braun  
 Michael D. Braun

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**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
 ) ss.:  
 COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10680 West Pico Boulevard, Suite 280, Los Angeles, CA 90064.

On February 23, 2011, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Michael D. Braun, I filed and served the document(s) described as:

**PLAINTIFFS' ADMINISTRATIVE MOTION FOR LEAVE TO FILE SUR-REPLY  
 IN FURTHER OPPOSITION TO DEFENDANT'S MOTION TO DISMISS  
 AND TO STRIKE FOOTNOTE 7 AND RELATED ARGUMENT**

**[X] BY ELECTRONIC TRANSMISSION USING THE COURT'S ECF SYSTEM:** I caused the above document(s) to be transmitted by electronic mail to those ECF registered parties listed on the Notice of Electronic Filing (NEF) pursuant to Fed.R.Civ.P. 5(d)(1) and by first class mail to those non-ECF registered parties listed on the Notice of Electronic Filing (NEF). *"A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P. 5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."*

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on February 23, 2011, at Los Angeles, California.

s/Michael D. Braun  
 Michael D. Braun